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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID BENNETT,

Defendant and Appellant.

H045394

(Santa Clara County

Super. Ct. Nos. C1103796, C1121262)

Defendant David Bennett contends, and the People concede, that the trial court erred when it imposed an on-bail enhancement, because his felony offenses had been reduced to misdemeanors under Proposition 47. We agree and reverse the judgment.

**I. Statement of the Case**

In July 2013, defendant was charged by information with three felony counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b))<sup>1</sup> and one misdemeanor count of use of a stolen access card (§§ 484g, subd. (a), 488). The information also alleged that defendant had one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and had served two prior prison terms (§ 667.5, subd. (b)). Following a bench trial, the court found defendant guilty on all counts and all the allegations to be true.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

In November 2012, defendant was charged by information in case No. C1121262 with: reckless driving while evading a peace officer (Veh. Code, § 2800.2, subd. (a)); carrying a concealed dirk or dagger (§ 12020, subd. (a)(4)); misdemeanor resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1)); misdemeanor using or being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)); and misdemeanor driving under the influence of drugs and alcohol (Veh. Code, § 23152, subd. (a)). The information also alleged that defendant had a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and had served two prior prison terms (§ 667.5, subd. (b)). The information further alleged an enhancement under section 12022.1 that defendant had been out on bail in case No. C1103796.

A jury found defendant guilty of all charges except carrying a concealed dirk or dagger (§ 12020, subd. (a)(4)). The court declared a mistrial as to that count, and it was later dismissed. The trial court found all the allegations in case No. C1121262 to be true.

In November 2013, the trial court sentenced defendant to a 10-year term in case Nos. C1103796 and C1121262, which included a two-year term for the on-bail enhancement.

In September 2015, defendant filed a petition for resentencing pursuant to Proposition 47 and requested that his three convictions for second degree burglary be reduced to misdemeanors. After the court denied the petition, defendant appealed. This court reversed the order and remanded for further proceedings.

In November 2017, the trial court resentenced defendant. In case No. C1121262, the trial court imposed the two-year midterm, doubled, for the violation of Vehicle Code section 2800.2, subdivision (a), two years for the on-bail enhancement, and two years for the prior prison term enhancements. The total sentence was eight years. The trial court rejected defendant's argument that the on-bail enhancement was no longer valid. In case No. C1103796, the trial court imposed a two-year county jail term concurrent to his state prison term in case No. C1121262.

## **II. Discussion**

Defendant contends, and the People concede, that the trial court erred when it imposed an on-bail enhancement under section 12022.1 at resentencing, because his felony offenses in case No. C1103796 had been reduced to misdemeanors.

Section 12022.1, subdivision (b) provides that “[a] person arrested for a secondary offense that was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years, which shall be served consecutive to any other term imposed by the court.” Both the primary and secondary offenses must be felonies. (§ 12022.1, subd. (a).)

After resentencing occurred in the present case, the California Supreme Court held that “Proposition 47 ameliorates a section 12022.1 enhancement in a nonfinal judgment if one of the underlying felony convictions attached to the enhancement has been reduced to a misdemeanor conviction under the measure,” because section 1170.18, subdivision (k) deems resentenced or redesignated felonies misdemeanors “‘for all purposes.’” (*People v. Buycks* (2018) 5 Cal.5th 857, 890-891 (*Buycks*).)

Here, the “primary offense” was case No. C1103796 in which defendant was convicted of three felony second degree burglary convictions. Since these three felonies were later reduced to misdemeanors under Proposition 47, none of those convictions qualified as a “primary offense” under section 12022.1. Thus, the two-year term for the section 12022.1 enhancement must be stricken. “[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances. [Citations.]’” (*Buycks, supra*, 5 Cal.5th at p. 893.)

## **III. Disposition**

The judgment is reversed and the matter is remanded for resentencing.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Grover, J.

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